Supreme Court of the United States

OCTOBER TERM, 1902.

Nos. 49 and 58.

THE KENNEDY MINING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

v.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Opening Argument of Mr. John Garber for Plaintiff in Error.

This cause came on for reargument Wednesday, December 10, 1902.

Mr. GARBER: If the court please, this is an action of trespass instituted in the State courts of California by The Argonaut Mining Company, the defendant in error here, against The Kennedy Mining and Milling Company for the value of certain valuable ores extracted by the plaintiff in error from the Silva Quartz Mine location, a patented location under

the laws of Congress owned by the plaintiff in error, the plaintiff in error claiming the right to mine all the minerals contained in it by virtue of that patent. The ores were taken beneath the surface, I will say in round numbers, two thousand feet vertically from the surface.

The claim of the defendant in error (plaintiff below) was based upon a patent of the United States, also issued under the Revised Statutes in regard to lode mining claims, for what is marked here on the map as the Pioneer Argonaut quartz mining claim. That is for a claim nearly in the shape of a parallelogram, having the end lines, as your honors will see, diverging in the direction of the dip of the lode; not parallel, but diverging to such an extent—some fourteen degrees, I think—that when the station from which these ores were extracted by the plaintiff in error was reached, instead of some 1,589 feet on the course of the lode, as delineated on and contained within the surface of the patent of the plaintiff, there would have been some four hundred feet additional between the two end lines of the patented location at the place where the ores were extracted.

Mr. Justice BREWER: What is the name of this mine—the Silva?

Mr. GARBER: The Kennedy.

Mr. Justice BREWER: And the Kennedy Company claimed that, too?

Mr. GARBER: Yes, your honor; but I was purposely omitting that for the present.

Mr. Justice BREWER: Do you claim any right under this?

Mr. GARBER: We claim under the Silva patent.

Mr. Justice BREWER: Then the question is whether the

Pioneer claim there, bounded by that line, comes down in such a way as would cut the Silva claim in two?

Mr. GARBER: The claim is that the lode whose apex is found in the Pioneer on its downward dip will be found underneath the surface of the Silva location.

Mr. Justice BREWER: A part of it.

Mr. GARBER: That the Pioneer cuts the Silva in its downward course; and it is a conceded fact in the case that the ores were taken from the identical lode which has its apex in the Pioneer location. The question, then, is whether by virtue of this patent and under the law of Congress the plaintiff below acquired extralateral rights on his claim, which we deny by reason of the non-parallelism of the lines.

Mr. Justice BREWER: That is the question in the case?

Mr. GARBER: That is the question in the case, as I understand it.

Upon that point in the court below the defendant in error made two claims, so far as this particular point is concerned. It claimed that under the construction or operation of the laws of Congress, its claim having been located under the law of 1866, and prior to the passage of the law of 1872, as counsel says repeatedly in his brief here and was said below, that the claim originated, matured, and was perfected under the law of 1866. We concede that it was located and worked under the law of 1866. We also concede, as he claims, that a month or two prior to the passage of the law of 1872 they had already made a claim for a patent for this claim, the Pioneer claim, and that application had passed to entry and payment prior to the enactment of the law of 1872. His further claim is that by reason of that entry prior

to the law of 1872 he stood to all intents and purposes just as if he had already obtained the patent before the passage of the law of 1872, on the principle that a perfected application, perfected by entry and payment, is the equivalent in law of a patent issued.

Mr. Justice BREWER: May I make this suggestion? that one of the questions that have troubled the court was the question of jurisdiction. The plaintiff below claims certain rights under the laws of Congress, extralateral rights, and you deny them.

Mr. GARBER: We claim rights, as we put it, under the Silva patent.

Mr. Justice BREWER: You do not claim any extralateral rights?

Mr. GARBER: No, your honor.

Mr. Justice BREWER: You simply deny the plaintiff's claim.

Mr. GARBER: We claim that by virtue of the laws of Congress and the Silva patent we obtained a grant to the whole of the ore that is under that surface, subject only to the rights of one who might have an extralateral right by parallelism.

Mr. Justice BREWER: Similar to the owner of an agricultural patent, who has all above and below the surface. Then the question, or at least one of the questions, that we have been considering is whether, when you simply deny the right of the plaintiff to extralateral rights, you have presented, under section 709 of the Revised Statutes, a Federal question upon which this court can take jurisdiction?

Mr. GARBER: That is one question.

Mr. Justice BREWER: I wanted to understand your position.

Mr. Garber: If the court prefers that I should, I will address myself to that point first.

Mr. Justice Brewer: Follow your own line of argument.

Mr. Garber: So far as that question is concerned, then, we claim that it is not a mere denial on our part of a claim made by the plaintiff under the act of Congress, but it is an affirmative claim on our part of certain rights granted to us under the act of Congress by the Silva patent, to wit, we claim, and I read some authorities here to that effect at the former hearing, that by that act of Congress and by that Silva patent we obtained title not only to the lodes whose top or apex is to be found within the Silva surface, but title to all the ores within the surface of the claim, regardless of the fact whether the apex was inside or outside their boundaries—the right to all the ores to be found within this surface extending down vertically into the earth, subject only to a possible right to be shown by somebody outside, like the Pioneer.

Mr. Justice Brewer: Is not that true of every patent that the Congress of the United States makes to lands throughout the country?

Mr. Garber: Perhaps so. Then what? Suppose a man has an agricultural patent, that his contention is that under the law of Congress he owns everything in that land, from the surface of the earth to the center, and then suppose that some one else claims, under act of Congress, an easement in that land, which easement is denied upon the proper construction of the act of Congress or otherwise, is not that claiming a right, title, or immunity under the act of Congress if the claim under the agricultural patent is denied?

Our claim is that we have everything in that land; that

we have an absolute right to every pound of ore within the boundaries of that land, with a single exception—that it may be entered upon by some one who proves that he has an apex outside and has parallel end lines which give him the title to the whole lode. Am I not claiming a right, title, and immunity under the act of Congress, then? This is my right. It is given to me, how? By the act of Congress, subject only to this other claim. If the other party comes and makes his claim, and I deny that under the law of Congress he has that claim, is not my right, which I claim under the law of Congress, denied by the decision construing this right contrary to my contention? I claim it all. It is mine, I say, by the act of Congress. I say that, properly construed, this act of Congress has given me the absolute right to that, except as against the man with parallel end lines.

But suppose the court says, No, you have not that right, even as against the man with non-parallel end lines. You have no right as against the man who has diverging end lines. That is a different right from that given by the law of Congress. That takes away from me something which belonged to me by virtue of my grant. It qualifies my grant, and not only affirmatively gives to the other man an unwarranted grant, but the very decision allowing the extralateral rights with non-parallel lines, which were not given by the act of Congress, *ipso facto*, and necessarily detracts from, takes away from, my right and misconstrues the act of Congress upon which my right and claim are based.

Mr. Justice WHITE: Your claim amounts simply to this: For instance, suppose you received an agricultural patent

and coal was found under that land and somebody came along and took out coal.

Mr. GARBER: There might be no Federal question there.

Mr. Justice WHITE: Why not?

Mr. GARBER: That might not depend upon the construction of any law of Congress.

Mr. Justice WHITE: It would depend upon the construction of the act of Congress giving you your patent.

Mr. GARBER: The law of Congress giving me my patent?

Mr. Justice WHITE: I mean your mineral. Suppose you got an ordinary patent to land, and that subsequently coal were discovered under that land, and that somebody came upon your land and began to take out coal.

Mr. GARBER: It might be a mere trespass——

Mr. Justice WHITE: I do not know whether it would be a mere trespass or not. You say the coal did not pass under the patent. Would you not be asserting a right under the act of Congress?

Mr. GARBER: I would be asserting my right under the act of Congress as the foundation of my title, but, if your your honor please, I think there may be a difference. In the case your honor puts, where I simply claim under an ordinary act of Congress and somebody else makes claim against me, the decision of the court in favor of his right as against mine might not construe my right under the act of Congress at all, in so far as my right depends upon the construction of that act of Congress.

Mr. Justice MCKENNA: Would it not involve the act of Congress?

Mr. GARBER: If that controversy arose you would have here a Federal question decided against me.

Mr. Justice McKenna: That was Mr. Justice White's question.

Mr. Garber: I did not understand the Justice.

What I say is this: This law grants me a certain thing. If the decision takes a certain thing out of that grant, then the proper construction of the question of the exception certainly qualifies my claim under the act of Congress. That is my claim.

I contend, further, that this exact point has been decided by this court. I remember that on the former hearing the case of King *v.* Amy-Silversmith (152 U. S., 228) was cited, where the identical question was presented here on writ of error to the State court. In that King *v.* Amy-Silversmith case the question was whether the Federal laws in regard to mining claims had cut off the extralateral right as against the party claiming to go under the surface, and the decision was against the claimant of the surface location. He took out a writ of error. That writ of error was sustained here. I say in that case the claim was identical with the claim we are making here. The party claiming the surface in that King *v.* Amy-Silversmith case claimed everything under the grant, with the exception, as we do here, of those who, having the right to the apex, followed the apex with proper extralateral pursuit. The apex in that case was in the other claim, and it was followed down under the surface of the plaintiff in error in that case. The case came to this court on a writ of error; this court took jurisdiction of the case and decided the case in an elaborate opinion.

Another case was that of Clark *v.* Fitzgerald (171 U. S., 92), decided at the same time with the Del Monte case. In that case the same question arose. The party claiming the

surface grant and the right to the ore by reason of his ownership of the surface patent was defeated by another party who burrowed under him, claiming, as is claimed here, the extralateral right. The plaintiff in error contended that under a proper construction of the act of Congress there were no extralateral rights because of the position of side and end lines. A motion was made to dismiss that writ of error. That motion was argued, and this court, instead of dismissing the writ of error, took jurisdiction and affirmed the judgment of the court below.

There are numberless other cases in this court, it seems to me, which tend in the same direction and lead to the same conclusion.

It seems to me the Wells-Fargo case was a parallel case, where, under a law of Congress, the express companies were required to stamp certain receipts. They made the claim that they had the right to charge the amount of those stamps upon their customers. That claim was denied, and they brought their writ of error here. This court decided that it had jurisdiction under that writ of error, and reversed the case. Wells-Fargo had no more a claim under an act of Congress than we have here, and not so much.

But to go back. Here we claim a certain thing under and by virtue of the mining statutes. We claim that by a proper construction of these statutes that is ours; that belongs to us. The court below decides: No; you are wrong. The legislation of Congress did not give you this thing at all. You have no right to it. We say we have a right to it, except in a certain contingency. They say: No; you have not a right to it, even though that contingency does not happen. Surely, your honors, if an act of Congress

gives me a certain right with a certain specified exception, and if I set up that right in the court below, and it is denied to me, my claim of immunity and right under the law of Congress is certainly denied just as much as if the other party were not making the claim of the nature that the Pioneer makes here. What difference does it make here that the Pioneer Company says, "We are claiming under the law of Congress," when the very moment that claim is sustained there is taken from us a certain thing which we say, under a correct construction of the act of Congress, was given to us by that act of Congress, viz., the right to hold that until some one comes with a proper extralateral claim.

Mr. Chief Justice FULLER: I should have asked counsel before this time if there is any objection on their part to Mr. Justice Harlan participating in this case. He happens to be absent, but we are expecting him.

[No objection was made by counsel on either side.]

Mr. GARBER: If your honors please, at a later stage I may have something more to say on this point. I did not anticipate that this question would be raised, and I may recur to it. By permission I will now go on with the merits of the case.

Mr. Chief Justice FULLER: Certainly.

Mr. GARBER: To recur to that: The plaintiff, as I said, made two claims in the court below. The claim upon which he mainly insisted, and upon which he chiefly rested his case, was this: That, under the act of Congress, as his rights originated under the law of 1866, no matter how flaring the end lines were——

Mr. Justice WHITE: Mr. Garber, as you stand I cannot

see those lines on the map. As I understand, you are pointing on that map to the lines that flare; get wider apart?

Mr. GARBER: Yes, your honor.

Mr. Justice WHITE: I could not see; that is why I asked.

Mr. GARBER: These lines of the Pioneer flare in the direction of the dip of the vein—can your honor see?

Mr. Justice WHITE: Yes; I see perfectly.

Mr. GARBER: If this survey had been made, as we say, according to the act of Congress, the end lines would have preserved the same length of vein, no matter how far apart they extended; but by flaring they follow in the direction of the dip, and consequently the deeper they go the more ground they get.

Mr. Justice WHITE: I am much obliged.

Mr. GARBER: Now, I say their claim was that their rights having originated under the law of 1866, it mattered not how divergent these lines were, they were entitled by the express language of the law of 1872 to all the ore to be found in that vein from its beginning down into the bowels of the earth, provided they kept within those flaring end lines. That was their claim.

An alternative claim of theirs, put in in view of the fact that the other might be decided against them, was that in any event, if they were not entitled to that right, they were entitled to have two perpendicular planes drawn down through the two points on the surface of their patented claim where the lode crosses it on the surface—lines perpendicular to the course of the vein—and that would be the limit of their extralateral rights. Now, the court below decided in favor of the plaintiff in error on the first contention.

Mr. Justice WHITE: In other words, as I understand you—pardon me for questioning you——

Mr. GARBER: Certainly.

Mr. Justice WHITE: They claim that they were entitled to the flaring end lines because their rights were governed by the act of 1866.

Mr. GARBER: Yes, sir.

Mr. Justice WHITE: But they further claim that if that were not so, then they had in effect a right to conform their lines to the act of 1872?

Mr. GARBER: No, sir; not exactly, for this reason: It is conceded that the act of 1872 allowed no end lines except those marked upon the surface of the patent. So they did not claim to conform to the act of 1872, but they claimed that if they had made a mistake and flared their end lines so that they could not claim to the full extent, they could go back and draw a perpendicular plane through the vein at the extremities of the vein on the surface and at right angles to the general course of the vein. Your honor will understand that in these veins in the earth the dip is always at right angles to the strike. What they call the strike is the length along the course of the vein, the dip being perpendicular to that. What they claimed was that at the least they should be entitled to draw perpendicular lines right through, cutting this vein at right angles to its course.

Mr. Justice MCKENNA: To which act did they assign that right?

Mr. GARBER: They based that right upon the decision of Mr. Justice Field in the Eureka-Richmond case, wherein he held that, prior to, and I may say even under, the act of 1866, miners were entitled to draw lines perpendicular to

the course of the vein at the extremities of the vein on the surface. If your honor recalls—as of course you do—that was still the opinion of some of the members of this court at the time the case of Iron Silver Mining Company v. Elgin Company (118 U. S., 186) was decided, wherein Chief Justice Waite and Mr. Justice Bradley dissented from the decision establishing that the flaring end lines under the law of 1872 absolutely controlled—dissented on the ground that they thought, even at that late day, that the end lines on the surface were not the controlling factors, but that the lines should be drawn perpendicular to the course of the vein at the extremities of the vein on the surface.

Mr. LINDLEY: That was under the act of 1872.

Mr. GARBER: That was under the act of 1872. And even under that act it was so contended by the two dissenting judges in the Elgin case; but Mr. Lindley contended that at any rate, under the act of 1866, if he was not entitled by virtue of the provisions of the act of 1872, which he contended applied back to the act of 1866, or to the patent under the act of 1866, he was at any rate entitled to have the perpendicular lines drawn down so as to take in that segment of the vein.

The first of those propositions was decided against the plaintiff in error in the court below, and Mr. Justice Temple, in delivering the opinion of the court, quoted largely from the opinion of Mr. Justice Field in the Eureka-Richmond case, where Justice Field made an elaborate argument to this purport: that there never had been a time since the passage of the act of 1866; that before that there never had been a time in the history of mining in the United States, when there could have been such a doctrine as that a party

could claim under ground a greater number of feet in a lode claim than he was entitled to by the law on the surface of the ground. He said that any such construction as that would do absolute and irretrievable violence to the provisions of the law that the claim should be confined to a certain number of feet along the course of the lode and to any depth as you went down from the surface. He said that this limitation upon the length of the claim and the quantity of ground that may be thus located or held was the controlling and paramount feature of the whole system of mining law. He said then that the lines must be drawn so as to give no more under the ground than on the surface of the ground. Upon that Mr. Justice Temple, in the supreme court of California, decided in this case that the first contention of the defendant in error was entirely—and obviously, he said,—inadmissible; that no such construction could be allowed, because it would nullify the whole policy and purpose of the law, and would lead, as Justice Field said in the Eureka-Richmond case, to a system where one man might create for himself a monopoly of the whole vein and oust all his neighbors and take the whole ground, regardless of the limitation upon quantity imposed by the law under which he claimed.

But Judge Temple further said that, notwithstanding that, although he could not take to the full extent given by the end lines, he was entitled, his claim having arisen under the act of 1866, to take what would be found within perpendicular lines drawn to the extremities on the surface, so far as it was also contained within these flaring end lines. In other words, he did not give them all that would be found within the two perpendicular planes thus drawn, nor did he

give them all that would be between the flaring end lines contained in the patent; but he gave them just what would be contained in both of them—in this particular case resulting in the converging lines delineated in the patent here.

Mr. LINDLEY: In other words, on that line of contention, if we had been successful we would have taken more than we claim?

Mr. GARBER: And more than you got.

Now, in further answer to Mr. Justice McKenna, one reason that Judge Temple gave for that decision was this: That the law leans against forfeitures, and that it was not to be supposed, without some compelling reason, that Congress, in enacting the statute of 1872, intended to derogate in any way from the rights acquired under the act of 1866; and that, according to the opinions of Justice Field and in certain other cases in the United States courts from which he quoted, as it had been intimated—he did not say decided, because, of course, they never did so decide—it had been intimated that there might be extralateral rights to a patent issued under and in pursuance of the law of 1866, even though the end lines were not parallel; that he must assume that that was the law, and that these extralateral rights must be allowed to prevail so far as they could consistently with the limitations of the act of 1872, because, he said, the law of 1872, instead of adding to the rights under the act of 1866, only put further limitations upon those rights; and it was within those limitations that the old rule or supposed rule that right-angled lines should be held to prevail, and he held that they did prevail in this case, and consequently affirmed the judgment below.

Mr. Justice PECKHAM: How do you get converging lines there?

Mr. GARBER: Take the outside end lines, double lines, and your honor will see that the right-angle line would come down here outside from the end lines. There is that end line, and here is the perpendicular. That leaves a triangle there. Here is a perpendicular line here, and here is an end line here, leaving that triangle there.

Mr. Justice PECKHAM: The end line you speak of comes within that?

Mr. GARBER: The perpendicular lines would lie within these lines. These two perpendicular lines and the other end lines would necessarily tend to converge as they went down.

There the case stands upon the merits.

Mr. Justice MCKENNA: That decision would not permit them to go outside of the surface boundaries.

Mr. GARBER: Not outside of the surface boundaries nor outside the vertical boundaries, because, he said, if you allowed them to go outside the perpendicular boundaries you necessarily destroyed the limitation of quantity on the vein, because as you go down you get more and more and he would not allow that. Following Mr. Justice Field, he said it was an absolute rule that the limitation of quantity is a controlling limitation in the policy of these laws; that you cannot get any more below than you have on the surface, and, as a necessary corollary, in order to avoid getting any more in depth than you have on the surface you cannot make the end lines divergent. You must have parallel end lines. There is no other way to do it.

So that is the way the case stands now. We claim that

the supreme court of California was entirely correct in holding that the party could not claim under his diverging end lines, in so far as that would give more ground underneath than the party owns on the surface.

We claim that he was wrong in setting up a further limitation in allowing him to take within the lines drawn perpendicular to the course of the vein, because we say that it has been absolutely and conclusively settled by the decisions of this court, so that it is not now really open to debate, that there can be but one set of end lines under any mining patent, whether issued under the law of 1872 or under the law of 1866.

To illustrate that: In this mine there may be found tomorrow a number of ancillary veins separate and distinct from the principal vein in controversy; you may find as many veins there as you can imagine, and they may run in as many different directions as you see fit to imagine. Mr. Justice Temple's view was that there would be but one thing to do, and that would be to take each separate case as the controversy arose and draw your perpendicular end lines from the extremities of that ancillary vein. There would be no other way to get any limitation upon it. The only way to get any limitation upon the principal vein, which must have a limitation, is by drawing lines perpendicular to the course of this vein. If we have another vein here with a different course, and still another vein with a different course, the inevitable result must be that you must draw as many different sets of end lines as you have different veins within the limits of the patent, with different courses to the principal vein.

I say that that of itself shows that that decision cannot

stand without overruling the whole line of authorities which have been laid down by this court in that respect.

At 4.28 p. m. the court adjourned till 12 m. tomorrow.

THURSDAY, *December* 11, 1902.

Mr. Chief Justice FULLER: Proceed, Mr. Garber.

Mr. GARBER: May it please the court, I was speaking yesterday more particularly with reference to the bearing of the statute of 1866 upon this case. I wish now to advert more particularly to the act of 1872, premising that in our contention all of these acts of Congress (the act of 1866, the act of 1870, and the act of 1872) constitute really but one statutory disposition, by the Congress of the United States, of the soil of the United States in respect of mineral lands.

Now, as I understand, it was one of the contentions of the defendant in error below, and is one of his contentions here, that if by a proper construction of the act of 1866 he acquired no extralateral rights, but was confined to his surface grant and all thereunder contained, still, by virtue of the provisions of the act of 1872, all limitations and restrictions upon his extralateral rights were removed, and that, by virtue of the act of 1872, if not before, he acquired full and complete extralateral rights, by the language of the act of 1872, to everything contained within planes drawn downward through his end lines, as delineated upon the surface of his patent.

It was also a counter-contention on the part of the plaintiff in error in that regard that, even if by the provisions of the act of 1866 extralateral rights accrued to the patentee—to the plaintiff below—that by reason of the passage of the act of 1872 its rights were so qualified and so limited as to

entirely abrogate all extralateral rights, and that, in addition to the direct operation of the act of 1872 in that respect, by the patentee's own voluntary action and election in applying for and accepting a patent under the provisions of the law of 1872, he renounced all rights which he might have had under the act of 1866 inconsistent with or different from those given by the act of 1872, and stood, in effect, just as he would have stood had his location beeen made instead of the patent having been taken under the act of 1872—as if, in fact, the statute of 1866 had never existed, but the statute of 1872 had been the statute of 1866.

Now, we base that contention upon these considerations: The act of 1872 made a series of provisions, all contained in one section, as to the location of claims and as to the rights which should be acquired by locators. I will not pretend to quote accurately the language of the statute, and if I do not give it correctly, in substance, your honors can correct me when you come to read it. It was, in substance, this:

All locations heretofore made shall be governed in length along the claim by the local usages, customs, and the law in force at the date of the passage of this act, May 10, 1872; that all claims hereafter located (that is, after May 10, 1872) may equal, but shall not exceed, fifteen hundred feet in length along the claim, but no location shall be made until a discovery of ore within the surface location or within the limits of the location is made.

This section, having first spoken of the claims theretofore located and provided for claims thereafter to be located, speaks generally of all claims, whether theretofore located or hereafter to be located, and says the width of *no* claim—not any claim hereafter located, but the width of *no* claim

shall exceed three hundred feet from the middle of the vein on the surface; nor shall any claim be limited to less than twenty-five feet by local regulation, unless for a specified reason it be necessary to do so, and that the end lines of all claims shall be parallel with each other.

Now, we contend that the provision as to the width of claims and the provision as to the parallelism of the lines of location apply equally to claims located before the passage of the act as to claims located after the passage of the act. We contend for it upon the plain and manifest construction of the language of the statute, the collocation of words and phrases, the framework of the statute.

We contend for it further because of the reason that such must be the presumed intention of Congress in enacting the statute.

And we contend for it still further because we say that by a deliberate and solemn judgment of this tribunal, the final arbiter of all these questions, that point has been conclusively, after full argument, settled and determined in regard to the provisions as to the width of claims.

In the case of Lakin *v.* Dolly—sometimes referred to as Lakin *v.* Roberts, I believe—in the circuit court of the United States for the ninth district, that exact question was presented. There was a location made prior to the act of 1866. The patent was also, I believe, applied for prior to the act of 1872, but granted after the passage of the act of 1872. The application was made long prior to the passage of the act of 1872, but the patent was granted after the passage of that act.

Your honors will observe that prior to the act of 1872 the only limitation upon the width of claims was that they should

be governed by the local rules, usages, and customs or laws in force; and by the law of 1866 there was no limitation placed upon the width of a claim, except that same limitation. But by the act of 1872, the substance of which I have quoted—that no claim shall exceed more than 300 feet—the question arose whether that provision was retroactive. It arose on this application for a patent, made under the act of 1866, upon a location antedating the act of 1866. The patent was granted for the requisite number of feet along the line of the lode; but instead of confining itself to three hundred feet on each side of the center of the vein at the surface, as the law of 1872 required, claiming to follow the antecedent laws, gave the locator or patentee a number of acres, some two hundred and fifty acres, on the sides of the lode. Collaterally the validity of that patent came in question in this Lakin *v.* Dolly case, and the circuit court decided, and the circuit court of appeals affirmed the decision, that the provision of the act of 1872 was retroactive, and that the patent was void, even collaterally, because of the excess of surface ground taken over the amount allowed by the act of 1872, and it was decided that the patent line should be drawn in so as to eliminate the excess over the three hundred feet and to leave the patent good for the legitimate amount allowed by the law. A writ of certiorari was applied for in this court, and also a writ of error. The question was elaborately and fully argued; and no argument, I undertake to say, will be made here or can be made here today by Mr. Lindley, occupying the same side that the applicant for certiorari occupied there, which was not fully, clearly, and cogently presented to this court on that application for certiorari.

This court denied the application for the writ of certiorari, thereby, as I contend, establishing the construction of this law, which, I say, has never yet been departed from, though Mr. Lindley, I believe, says to the contrary; but I say I think I can show that it has never yet been departed from in any case, certainly not in this court.

Now, if that provision as to the width of the location in the act of 1872 was controlling, and even sufficient upon which to base an attack upon a patent granted by the Land Department as to the width of the claim, and cut it down to the limits of the act of 1872, upon what basis of reasoning can it be contended that the provision which follows it in the act of 1872, that the end lines of each claim shall be parallel, was not equally retroactive and just as applicable to the Pioneer location made under the act of 1866, so as to bring it within the act of 1872, so far as extralateral rights are held to depend upon the parallelism of end lines? The reason, it seems to me, is clear and plain why both those provisions should be held to have been retroactive. Under the act of 1866 there was no particular objection to allowing an unlimited width of surface to be taken up with the given and restricted length of lode along the vein. There was no reason why it should not be allowed. There was no harm to be apprehended from its allowance. The surface of the ground was only allowed for the convenient working of the lode. The lode was considered the principal thing, the surface ground a mere incidental accessory. All other veins or lodes discovered within the limits of the surface ground were excepted from the operation of the patent granted on a location under the act of 1866. That mineral grant was subject to entry and exploration, to occupation

and patenting by any subsequent claimant who, by his industry and perseverance, should discover ores or veins, and it is known that very often other valuable lodes were discovered in the immediate vicinity of the patented lode, without the boundaries of that lode, without the actual lode itself. No matter how much surface ground they took under the act of 1866, that was the case, and we all know that the most valuable lodes are sometimes found in close proximity to the patented lode, especially in some formations.

But the very moment the statute of 1872 was passed, and I may remark here that it seems to me that the vital, the main, if not the only, distinguishing characteristic and difference between the legislation of 1872 and that of 1866 was based on the recognition of this fact of the discovery, so often made, of other valuable lodes within the limits of the surface patent. But the moment the act of 1872 made the change, the moment the act of 1872 extended the rights and gave these additional privileges to claimants under the act of 1866, your honors will see at once how utterly ruinous and destructive of all policy which pervades and breathes through this whole legislation would have been the provision of the act of 1872 giving to him all the other lodes within the surface of his location. In the very case of Lakin *v.* Dolly he would have had a monopoly of 250 acres or thereabouts of mineral land, with the absolute right, given by the law of 1872, to take every other lode he might find within that whole 250 acres, and there might have been 5,000 feet, or there might have been a mile, or it might have taken up a whole district, and have included a congeries of veins, so as to overturn what Judge Temple approved from Justice Field—the main, great policy of the law to restrict awards

to discoverers to a certain amount of land and allow others to have their chance. So we see at once why any legislature in making that change would have made the corresponding, corrective, and safeguarding provisions restricting width and requiring parallelism of end lines, and also why both should apply to all claims, no matter when located We contend that under the legislation of 1866 parallelism of end lines was necessarily implied—just as much implied as end lines themselves were implied. In the whole statute of 1866 there is not one word or syllable which mentions in terms end lines at all.

Mr. Justice PECKHAM: Does not the act of 1872, providing the limitation of width of claim in part, make end lines parallel?

Mr. GARBER: Yes, your honor, but I want to show the parallelism between the two enactments in order to show that the decision of this court in Lakin *v.* Dolly held the act to be retroactive as to width, and that the same reasons require a holding that the provision of parallelism was retroactive.

Mr. LINDLEY: Do you claim that the denial of a writ of certiorari is tantamount to a judgment?

Mr. GARBER: I do, most undoubtedly. When a writ of certiorari was applied for and denied, after full argument made, I can think of no reason why that should not stand—why the denial of that writ should not stand for all purposes just as high as the most definite affirmance of judgment after granting the writ.

Mr. Justice WHITE: I think you will find that the ruling of this court is that the error in the judgment below does not control at all when the court refuses to grant a writ of certiorari.

Mr. GARBER: I stand corrected, of course; but it would have seemed to me that the refusal by this court of the issue of a writ of certiorari would have that effect, because, unless the court sees some reason why the judgment below should stand, it would seem to me that it would grant the writ.

Mr. Justice WHITE: This court has held in many cases, and it is the well-settled rule of our appellate jurisdiction, that the mere filing of an application for the issuance of a writ of certiorari was not intended to accomplish the abrogation of the writ of error. Otherwise the provision of the act making such judgment final would be nugatory, and judgment could be granted only in exceptional cases. That has been the doctrine of a long line of cases.

Mr. GARBER: That is the rule of this court?

Mr. Justice WHITE: That is the settled rule of the court.

Mr. GARBER: With all due deference it seems to me that the provision for the issuance of a writ of certiorari is to enable this court to prevent the consummation of erroneous judgments.

Mr. Justice WHITE: This court has held directly to the contrary.

Mr. GARBER: Then I stand corrected. But, independently of all that, I claim that the decision of the court in the Lakin *v.* Dolly case and the decision of the circuit court of appeals approving that decision stand firmly upon the reasoning upon which they were founded.

Now, I will say that it seems to me the only practical difference between the act of 1866 and the act of 1872, so far as we are concerned with them here today, was in the giving, as a bounty, an additional privilege consisting of the right to take ancillary and different and distinct lodes.

So far as the principle of parallelism is concerned, intended, as it was, solely to preserve the limitation upon the lode, it was the same and equally inherent and operative under both statutes. And even if I should be wrong in holding that that provision of the act of 1872 was retroactive, still I should ask this court to decide, as Justice Field intimated in the Eureka-Richmond case, that it was not a new enactment at all, but a simple restatement of a pre-existing and acknowledged rule. There are many provisions in this act of 1872 which have been so construed as not new enactments, the only object of the act of 1872 being to make a little plainer and more definite what was already implied in the act of 1866. For example, as I said before, there was not one word in the act of 1866 referring to end lines. End lines were not mentioned.

But in the Flagstaff case, which arose upon a location made under the law of 1866 and a patent already granted and issued under the act of 1866, finally concluded and delivered and accepted by the patentee—in that case it was held that the party, by applying under the act of 1866 and obtaining his patent with surface ground marked out upon his patent, was absolutely bound by the end lines of his patent, regardless of what his rights were or might have been under the original location and regardless of the amount of ground he had taken up in his location. In that particular case I believe the party under the act of 1866 had located—I think it was—2,600 feet in length along the course of the lode. That was allowed him at that time by the law. His contention was that as no end lines were mentioned in the act of 1866, and as nothing was said about them—all that was said in that act was that

the party who had complied with the local rules, usages, and customs, and taken up a certain number of feet, as allowed by those rules, usages, and customs, should be entitled to follow his lode wherever it might go in its descending course, although it might enter land adjoining; and I wish to call particular attention to this provision—which land adjoining shall be held subject to this condition. Now, he had taken up 2,600 feet. He contended that under the language of that act he had a right to his 2,600 feet, and that he also had the right to draw perpendicular end lines at the extremities of his lode, and follow that lode, within those perpendicular end lines, just as Judge Temple decided the parties had the right under this patent. But this court decided that, although end lines were not mentioned in terms in the act of 1866, they were necessarily implied, and that the act of 1872, which, in so many words, speaks of the end lines, and says that the extralateral rights shall be limited and controlled by planes drawn downward through those end lines—this court said that those provisions of the act of 1872 were simply identical with or of the same effect as the provisions of the act of 1866. The language of this court, I believe, was substantially about this: Although the act of 1872 is a little more specific in its terms, the intent of both acts as to side lines and end lines is the same; and that enunciation has been oftentimes repeated in subsequent cases by this court, and is now, as I understand it, the settled rule of this court.

So I say that, as they decided that the provisions of the law of 1872 as to end lines were just as controlling as if they had been embodied in the act of 1866, basing the decision solely on the provision limiting the claim to so many feet

along the lode to any depth, it must follow that that provision would imply in the act of 1866 the same principle of parallelism which is found expressed in the act of 1872.

Mr. Justice McKenna: How do you account for that omission in the act of 1866 and its explicit statement in the act of 1872?

Mr. Garber: In the same way, it might be said, as we account for the omission as to end lines in the act of 1866. Do I understand your honor's question to be, how do I account for the omission of any mention of end lines in the act of 1866? In the same way they said nothing about the parallelism of end lines. Your honors have decided, as I understand, that the intent of the provision was in both laws exactly the same as to both end lines and side lines; and as the end lines were implied in the act of 1866 without being expressed, to the same effect as in the act of 1872, the parallelism of these lines, for the same identical reasons, should be also implied in the act of 1866. There is no reason why the provision of parallelism should not have prevailed under the act of 1866 as fully and equally as in the law of 1872.

Another reason which has suggested itself to me, if your honor please, is this: That the attention of the legislators, when they came to speak explicitly of end lines, and especially when they came to provide for the ancillary lodes as appurtenant to the location, was more directly called to this provision, and it was more apparent why there should be this provision, so as to control the length of the ancillary lodes. Under the act of 1866 it mattered little how much these lines flared. So far as the surface was concerned, you might have taken many feet over and above the amount

allowed by the law; you could have flared your lines so as to get thousands of feet in a short distance. That made no particular difference under the law of 1866 if, as we contend, parallelism was, under it, essential to extralateral right; but under the law of 1872 it might make a vital difference in giving a greater length along the ancillary lode. Therefore, as I said before, it seems to me that the provision in the law of 1872 was not a new enactment, but simply a restatement of a pre-existing and recognized law.

Mr. Justice McKENNA: In other words, your contention is that the law of 1866, under which the lode was extended, furnished authority to carry the length of the lode downward until it passed out of the side lines of that location?

Mr. GARBER: Yes, your honor.

Mr. Justice McKENNA: Then, in order to avoid conflict with other veins and lodes, it became necessary to define the side lines?

Mr. GARBER: That is my idea.

Mr. LINDLEY: There is no provision for making the side lines.

Mr. Justice McKENNA: But the lines are parallel.

Mr. GARBER: In the Flagstaff cases and the cases that followed, all pretense was forever wiped out, if any existed, of the right under the law of 1866 to draw other than your surface end lines. They had established an iron rule that in the United States, under the law of 1866, when you take your patent under that law, if not before, you have bound yourself absolutely to your end lines and planes, and, we contend, you cannot take extralateral rights unless those end lines are parallel. I can conceive of no reason whatever, if the settled doctrine of this court as to locations under the act

of 1872 must deny extralateral rights under flaring end lines—I say I cannot conceive of any reason why, under the law of 1866, it must not equally deny extralateral rights under flaring end lines, because, for all purposes connected with that question, the laws are the same in practical and substantial effect.

In addition to this argument and this position that the rights of the defendant in error here depend upon the law of 1872, and not upon the law of 1866, we give another reason: As I understand it, this law of 1872 had simply proffered as a bounty an additional right, which might be accepted or rejected at the pleasure of the locator under the law of 1866.

Thus I interpret Wolfley *v.* Lebanon and New Dunderberg *v.* Old—that the law of 1872 said to the old locator: You can stand on your rights if you see fit; but you are offered a bounty upon application for a patent; and if you do see fit to accept this bounty and apply for a patent giving you this enlarged and additional right, then in the very act of making application and accepting bounty you subject yourself to all the limitations which are imposed by the law of 1872; if the locator under the law of 1866 had the right to perpendicular end lines, as decided by the supreme court of the State of California, he could have retained those rights, but the new rights would not be conferred until he complied with certain requirements. He can say, I will apply for a patent, and take all these bounties given by the law of 1872, and I will not only take this lode, but all other lodes which may be found within my surface boundaries. Then I take it subject to the conditions of the proffer, and I am bound by those conditions. Consequently, it was decided that

whatever might have been the rights of the party before the passage of the act of 1872, when he applied for a patent under the provisions of the act of 1872 and took a patent under that law, he elected to be bound by all those qualifications, and must have been held to have abandoned, in the language of the court, all his antecedent and inconsistent rights.

They say here that they did not apply under the provisions of the act of 1872. We submit that clearly they did. It is true that they did apply under the law of 1866; that their application had passed to entry and they had made payment, and that for certain purposes that was the equivalent of a patent. But it still did not pass the legal title, and the matter was still under administration and subject to the control of the Land Department, which could have changed the end lines at any time before the actual issue of the patent and made it conform to the laws, as it was the duty, we contend, of the party seeking the additional rights under the law of 1872 to make the lines so conform before he accepted the patent under the law. True, they had made entry; but they went further, and after the passage of the law of 1872 they accepted from the Government a patent giving them not only the right guaranteed them by their location under law of 1866, but these additional rights over given by the law of 1872. *Ipso facto*, by that act, we say, they at once became bound just as much as if they had located under the act of 1872, with all its qualifications and restrictions, and they could no longer claim any end lines but the end lines prescribed by the law of 1872—those running through the surface end lines—and could claim *no* extralateral rights unless those lines were parallel.

In regard even to a patent issued and accepted under the law of 1866, this court decided in the Providence case and in many other cases that the same doctrine applied.

In the Providence case the locator had 3,100 feet——

Mr. Justice McKENNA: Before passing to that, if they had the length of the lode under the act of 1866 and extralateral rights, that would give them the ore in dispute, would it not?

Mr. GARBER: If they had the length of the lode given in this patent and took their perpendicular lines, do you mean?

Mr. Justice McKENNA: Under the act of 1866, as you construe the act.

Mr. GARBER: As I construe the act of 1866 it would be the same as under the act of 1872, and he would be bound by the end planes, and they must be parallel to give any extralateral rights.

Mr. Justice McKENNA: Leave out the necessity of parallelism of surface lines under the act of 1866.

Mr. GARBER: If there was no parallelism required, then of course they would have taken all this ore.

Mr. Justice McKENNA: That is what I mean.

Mr. GARBER: I was going to say that in the Providence case the patent had already been issued and accepted, and the party took about thirty-one hundred feet in his location, which was made long prior to the passage of the act of 1866. By his patent he lost about 700 feet of that lode. This court held that he had lost it. How did he lose it? I say on the doctrine of the Dunderberg case and the Wolfley case, he lost it because, instead of standing by his rights, he came under the law of 1866 and applied for a patent, and, as the law of 1866 was construed with the law

of 1872, and to be substantially the same, he suffered that loss.

So I say here if (which we deny) he ever had any rights to ores not lying within parallel end lines, he waived those rights when he applied for the patent under the law of 1872, which required parallelism in the end lines. He accepted the provisions of that act and renounced all benefits he had before not consistent with it.

Now, I think I have shown that we are claiming here under the law of 1872, and the defendant here is claiming under the law of 1872. We claim under our Silva patent all rights and immunities under the law of 1872, and everything in that patented ground, from the surface of the ground down. We claim that upon a proper construction, the effect of that patent was to grant us absolutely everything from the air down to the lower regions.

Mr. Justice McKENNA: Before passing to that, to avoid some confusion in my own mind, I will ask this: What rights did you acquire under your construction of the act of 1872?

Mr. GARBER: I beg your honor's pardon, but I did not quite catch the question.

Mr. Justice McKENNA: What rights do you claim under your construction of the act of 1872 the locator gained, if he gave up all rights under the act of 1866 and took only those under the act of 1872?

Mr. GARBER: He acquired the right specified in that act, not only to the vein he had located, but to all other veins and lodes and ledges within his surface boundaries, and to the extralateral rights between the parallel end lines.

Mr. Justice McKenna: But I understood you to say that the end lines were not parallel.

Mr. Garber: I thought your honor meant to ask what a man could acquire, not what he acquired.

Mr. Justice McKenna: What rights did the claimant acquire in this case?

Mr. Garber: He acquired the right to all additional lodes within the surface boundaries down and within these four planes extended vertically into the earth.

Mr. Justice McKenna: And he lost what rights?

Mr. Garber: He lost his extralateral rights.

Mr. Justice McKenna: On the main lode?

Mr. Garber: On all the lodes. He lost his extralateral rights because he undertook to accept the bounty provided by the act of 1872, but by the act of 1872 the extralateral rights were limited and could only exist in case the end lines were parallel. It was no hardship for him to make them so, and it was certainly not an onerous requirement for the Government to impose that the party, when he went to get his patent, should simply take the precaution to make his lines parallel on the surface.

Mr. Justice McKenna: Suppose your construction is not correct that he got those lodes; in other words, that the other lodes discovered would necessarily be determined by his end lines, referring you to the Champion case in 171 U. S.

Mr. Garber: But he got them under the lines——

Mr. Justice McKenna: He got them under the surface.

Mr. Garber: He got them under the four vertical planes, and as long as he has them I say he cannot go back again

and reject all that was done at his own instance under the law of 1872.

Mr. Justice McKenna: Then for what he got he relinquished his extralateral rights?

Mr. Garber: Yes, sir.

Mr. Justice McKenna: On all the veins?

Mr. Garber: On all the veins. That is my position. (Note.—Of course, this is on the hypothesis, made for the sake of argument, that there could be extralateral rights under flaring lines, even under the law of 1866.)

Now, I was going on to say we claim under the law of 1872 and under the patent granted under that law, because the Revised Statutes, of course, are the same as the law of 1872—we claim the Silva mine and everything within vertical planes drawn downward through those lines within our claim. That is the right, privilege, and immunity we claim. It has given us everything within those boundaries.

Mr. Justice Peckham: Is there a line on that map showing the boundary between the Silva mine and your claim?

Mr. Garber: Here are the lines. Can your honor see them?

Mr. Justice Peckham: Yes; when you put your finger down there.

Mr. Garber: I will take the pointer and show your honor exactly. Here are the lines of the Silva claim. That is the surface ground. We claim that the law and patent, fairly construed, show our right, privilege, and immunity. We claim it under a law of Congress which granted it to us. We will suppose that that is the Silva claim. That is what we claim. We claim it under a law of Congress which, if fairly construed, will show that our right, privilege, and

immunity should have been granted to us by the court below. What we claim is this: If we got, not this, which we say was the proper construction of the act, but we got this with the slice cut out of it here, as wide as that vein which was claimed by somebody else—in other words, if the decision is that that slice did not pass to us, the result is a denial of the right under the laws of Congress. We say that that patent passed us all that. They say it did not.

Now, is not that setting up a right, privilege, and immunity under the law of Congress which was denied us in the court below? What matters it why it was denied us? For no reason could it have been denied us if we have the right. If that was the fair construction of the law, if that was the effect of the patent, that was our right, privilege, and immunity under the laws of the United States, and the court below denied it. How can it be said that we have only set up a negative claim? It is a positive and affirmative claim. We claim that the statute and the patent granted us that thing. They say they did not, and part of it was left out that did not belong to us.

Now, if we are right, if they had no extralateral rights, then, necessarily, the whole thing passed, and we stand by the statute and by the patent. They say to the contrary. Can it be, both parties claiming under a law of Congress which has various sections in it, that gives one party a certain thing under one section which qualifies the claim by the other party under the other sections—can it be said that that is a mere negative claim and he is not claiming under the statute? In the negation of the one is the affirmance of the other. The moment you decide that they had the extralateral rights you decide that our claim, which we set up

under the law of Congress, was not well founded. And if that decision was erroneous we submit that we have the right to bring the question here and that this court has jurisdiction.

Furthermore, we say that in the Amy case, and especially in the Clark-Fitzgerald case, that very question, that identical question, of jurisdiction was passed upon by this court on a motion to dismiss, which was denied. That established the rule for this court, as I understand.

Mr. LINDLEY: In terms?

Mr. GARBER: Not in terms, but necessarily, because this court does not take jurisdiction and affirm a judgment in the face of a petition, supported by argument, to dismiss for want of jurisdiction, unless the court holds that it has jurisdiction.

In this connection I wish to read a short extract:

In Great Southern Fireproof Hotel Co. *v.* Jones (177 U. S., 449, 453) Mr. Justice Harlan quotes with approval the following from Mansfield, &c., Railway Co. *v.* Swan (111 U. S., 379, 382):

"The rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all the courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

"On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This

question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Now, the Amy case is on all fours with the case at bar. This court must have examined into and decided in favor of the jurisdiction before rendering its opinion on the merits.

In that case it was said of the ore in the Non-Consolidated (corresponding to the Silva here) that if it could not be taken under the extralateral right of the Amy (corresponding to the Pioneer here) "it becomes a part of that claim"—that is, it was part of the property conveyed by the Non-Consolidated patent.

So in other cases here. There was one case—I forget the name of it now—decided by Mr. Justice Gray.

Mr. Justice BROWN: Salva *v.* Bobly?

Mr. GARBER: That is the case. That was a question as to a patent bounded by tide lines. The question was whether it extended to the high-water mark. It was contended that that was a mere State question; but this court said, "No; we have jurisdiction; we must construe the grant; we must decide what that grant covers." So we say here that it was for the court below, and is now for this court, to construe the laws and the patent under which we claim, and to say whether, as we say, it conveyed one thing, or whether, as they say, it conveyed another and a lesser and different thing.

So in the Wells-Fargo case, to which I referred yesterday, decided by Mr. Justice White. It might have been said there that that was a negative claim on the part of Wells-

Fargo—much more so than here. The statute said that the express company should furnish a stamped receipt to the consignor. The company said: We will furnish the stamp receipt but we will increase your charge by that much, so as to make good our loss. It was contended here that the question whether the express company could raise its charges in that fashion was not a Federal question. The decision of the court below was brought here; this court took jurisdiction and said in effect that the court denied a privilege set up by Wells-Fargo under the statute.

So, in bankruptcy cases often decided by this court, where there is a certain exception, it is always decided that the denial of the exception, although it be negative, raises the question of jurisdiction.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1902.

KENNEDY MINING AND MILLING COMPANY
vs.
ARGONAUT MINING COMPANY.
} Nos. 49 and 58.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

DECEMBER 11, 1902.

Closing Argument of Mr. John M. Wright, for Plaintiff in Error.

Mr. WRIGHT: If your honors please, when the record in this case was prepared, counsel had in view two cases, each of which had had the most careful consideration of this court. Each came up on a writ of error; each was, as we insist, on all fours with the case at bar. As in the case at bar, title was alleged to an underground segment of a vein, the apex of which lay outside the claim inclosing such segment. In each of those cases, as here, no title to the ore in question was alleged by the outside party by reason of his ownership of the surface, or of the land, if you please, including such ore. In each of these three cases title was asserted by the outside party under his claim of an extralateral right attaching to the outside claim. I refer, if your honors please, to the case familiarly known as the Elgin case, 118 U. S., 196, and the Amy case, 152 U. S., 419.

As suggested by my question to Judge Lindley, the ques-

tion of jurisdiction was raised in the Elgin case by the objection on the part of the owners of the Gilt Edge claim to the introduction of the title on the part of the owners of the Stone claim. I say it was raised by objection to the introduction of the evidence, just as here.

When the patent to the Pioneer was offered we reserved our objections to that patent as showing title to the *locus in quo* in this case. I apprehend there is no difference in the manner in which these questions were raised in these two cases. For the moment I am not able to recall the exact manner in which the principal question was raised in the Amy case. In the Elgin case, however, when this court came to determine the rights of the parties, the court said "the objection * * * was well taken to the offered proof."

Now, if your honors please, we feel that there has been nothing in the argument of counsel on the other side to make us regret that we have relied upon the authority of these two great cases in coming before you. Whether the writ of error was contested in either of these cases appears to me to be immaterial, because, upon the authority that was read by my associate this morning, and which has gone into the minutes of the stenographer, this court makes it its first duty in every case to determine, first, the jurisdiction of this court, and then the jurisdiction whence the case came.

We consider this a conclusive presumption that in each of these two cases your honors took cognizance of all those questions which affect the jurisdiction and maintained it, because the jurisdiction clearly appeared.

One case that was tried in the United States circuit court in

California, and decided by Judge Sawyer, was suggested by the question asked by Mr. Justice White this morning. The case I refer to is the case known as the Amador-Medean. In that case an agricultural patent had been issued, containing a mineral lode, and by the side of it and subsequently a lode mining claim was located by another party. When the locator of the mining claim undertook to enter underneath the surface of the agricultural claimant, the dispute was raised and the case was decided by Judge Sawyer to the effect that the subsequent locator of the mineral claim would not be permitted to go underneath the surface of the prior agricultural patentee. The matter was brought here, and I have had the history of it here from one of the attorneys in the court below, Hon. A. C. Adams, of San Francisco Before the case was decided here, counsel who had charge for the appellant in this court announced that the same parties now owned both properties. As I recollect the language of the then Chief Justice, he stated that this was not a moot court, and for that reason this court refused to determine the questions involved in that case. It is to be regretted that such was the fact, because that would have presented a precise parallel to the state of facts such as is presented by the question of Mr. Justice White.

We maintain, however, your honors, that in this case we are standing upon our immunity, upon our right under our patent, and not under "common-law right" merely. That has been read into this case by counsel on the other side, and, with all due respect, by the court below. Our claim has always been that the rights on which we stand *were granted to us under the law by our patent.*

It is not a question of presumption; it is a matter of

grant, and the sole reservation was a conditional one. The condition has already been expressed here, and is fully understood. We say that if it be true that our rights in this matter are not protected, that if there is no protection when we are entitled to an immunity of this kind, we are surely at a loss as to how our rights may be protected by this court in any similar case.

However, as I stated at first, we are entirely satisfied to rest this case, so far as the question of jurisdiction is concerned, upon the two cases referred to, each of which is upon all fours with the case at bar.

As I have only a short time, and as there are many points that ought to be discussed, I wish to take up what seems to me the first and most important of all the matters touched upon by Judge Lindley.

One question is as to what rights were preserved by the statute of 1872.

In almost every discussion of this subject to which I have listened, it would seem that counsel understand the language of the statute to mean that both before and after patent, and under all kinds of patents, all rights *claimed* were preserved. If your honors please, we understand the matter this way: that where a man had a *location*, he might preserve that location in its then existing form; but if he he went into the land office and asked for a patent, he must accept that patent under the reservations provided by law.

There are four notable instances illustrating my meaning.

Take the Flagstaff case. Here is a case where the patent itself was granted only a short time before the law of 1872 was passed. The claimant to the lode, as your honors are well aware, claimed 2,600 feet. As I understand the

statute, if he had stood upon his location and had never come in under the law of 1866 and secured his patent, he might have retained his rights, whatever they were. The question as to what those rights were was, I think, the reason for the enactment—first, of the law of 1866, and, subsequently of the act of 1872.

At any rate, the doctrine of counsel in the Flagstaff case and in many other cases was that the lode was the principal thing. In many cases it was the only thing. In the Flagstaff case that doctrine received a severe shock. The claim was there made that all the rights claimed under the location were preserved and protected by the laws of 1866 and of 1872 as well under the patent as under the location. But the Flagstaff decision says: No; you are confined to your rights as defined by your patented lines.

The most recent case of this kind is the Providence case, which was adverted to today. Two segments of the lode were cut off by the patent, and the adjudication of the court maintained the cutting.

Mr. Justice McKENNA: I do not understand what you mean by saying that if he had gone into court he would have reserved his rights under the location.

Mr. WRIGHT: Did I say "the court"? I should have said if he had gone into the Land Department. Excuse me.

Mr. Justice McKENNA: Mr. Justice White says you said "Land Department."

Mr. WRIGHT: I say the same thing was done in the Providence case. There were about thirty feet, according to my recollection, north of the north end line of that claim, and there were 600 feet south of the south end line of that claim.

The adjudication is that the two end lines of the patented ground cut off those two outside portions of the lode. This was a case, too, where the patent itself was granted under the act of 1866.

The decision in Wolfley *v.* Lebanon lays down the same doctrine in clear and explicit terms. However, that is not of the same high authority as the two I have named nor as the last I shall name on that point.

The case of New Dunderberg *v.* Old, 79 Fed., 598, quoted from so extensively and illustrated by Judge Lindley today, laid down the doctrine very clearly in the court of appeals that he might have retained his claims under his location if he had chosen to do so. The doctrine I have enunciated was very clearly laid down, and, as quoted by the distinguished counsel today, the court said it was not the repeal clauses of the act of 1872 that destroyed the claimant's rights; it was his own act when he came into the Land Department and demanded a patent.

Mr. Justice WHITE: Was that a case where application was made for a patent under the act of 1872?

Mr. WRIGHT: In the case of one of the claims in suit it was, and in the other it was not.

Mr. LINDLEY: The Dunderberg was after the act of 1872, and the Frostberg was before the act of 1872.

Mr. Justice WHITE: In what State was the application for a patent at the time of the act of 1872 was passed?

Mr. WRIGHT: My impression is that in the case of the Frostberg application it had passed to entry.

Mr. LINDLEY: The Frostberg had passed to entry. The Dunderberg had not been applied for, as I understand the reading of the opinion.

Mr. WRIGHT: The question there was not as to any outside parts of the vein. The question was not as to the outside parts of any veins. The question was as to the ownership of those parts of the "other veins" found within the boundaries of the claim extended down vertically. The case did not go to the extent of inquiring whether any of the outside parts of the veins were or were not held under the patents. But the doctrine I have mentioned was very clearly and explicitly laid down, so clearly, as we think, that words could not make it plainer.

Counsel has quoted from the statute showing what additional rights were conferred by the statute of 1872 on the owners of the already existing patents—that is, patents that had already been issued under the law of 1866. The law, however, simply says that all the rights conferred by this act are conferred upon the owners of those old patents. Now, does the law say, as counsel contend, that it gave any more?

Under the law of 1872 extralateral rights were granted between parallel end lines. Is there anything in his contention? Is there any meat for him in this particular portion of the statute? We think not. It says the *same* rights were conferred. Those same rights allowed the enjoyment of all lodes within parallel end lines—the other lodes, as the statutes and decisions say, as well as the original lode located. But now the statute does not say, nor does it imply, that the old locations were entitled to *any more* than the new locations. The *same* rights were maintained by the new statute—no more, no less.

Mr. Justice McKenna asked Mr. Lindley whether he could have secured his patent under the law of 1866. We

think he could. The statute of 1872 says applications for patents already made may be continued—I have forgotten the exact language—may be prosecuted to a decision, but where adverse rights do not exist then he may apply for a patent under this act.

What is the condition of the case at bar? There were no adverse rights, and if I read that statute correctly, the old application might have been pursued to patent under the old law. Whatever that law would have given them, they might have come in under it as they did under this law. But all the indicia of this patent make it clear that they took their rights under the law of 1872. The statute gives them all "other lodes." Counsel come here to day and say that they ought to be permitted to claim the extralateral rights between flaring end lines, as to their original lode, and that they ought to be confined within parallel end lines as to their "other lodes," if any be found.

Mr. LINDLEY: I did not say that.

Mr. WRIGHT: I so understood you, Mr. Lindley, but I beg your pardon if I misstate.

Mr. LINDLEY: I said there might be no extralateral right as to the other lodes.

Mr. WRIGHT: There would be no extralateral right. This court has decided that the same end lines bound all lodes, and whatever end lines you have in the Pioneer patent, beyond peradventure those end lines are to bound all lodes. So it is useless for counsel to state here a fact which he does not know, that there is no other lode within those lines. The argument fails. There may be many lodes, each of them of infinitely greater value than the lode in contro-

versy here, just as Mr. Justice McKenna has called attention to the facts in the Providence case.

Now, this brings up again what we conceive to be the reason for this limitation upon the lode as expressed in this statute. The limitation always existed, but when the statute said parallel end lines—to illustrate my meaning I cannot do better than to read from the closing words of the brief we filed in this cause, on pages 73 and 74. It appears that both counsel in the Providence case in this court "conceded," so far as they could "concede" such a thing here or elsewhere, that parallel end lines on the surface were not required under the old locations. This court said:

"It may be true that under the act"—

As I understand this, it means,

"It may be as you gentlemen 'concede.'"

"It may be true that under the act of 1866 the patenting "of the Providence mine in its irregular shape was in all re- "spects legal and proper, and that the act did not require "the location to be made in the form of a parallelogram or "in any particular form, and that there was no require- "ment that the end lines should be parallel. It is also true "that under that act only one vein could be included in a "location, no matter how much surface ground was included "in the patent, but that under the act of 1872 possession and "enjoyment of all the surface included within the lines of "their location and of all veins, lodes and ledges through- "out the entire depth, the top or apex of which lies inside "of such surface lines extended downward vertically, were "given.

"But rights on the strike and on the dip of the original "vein, and rights on the strike and on the dip of the other "veins, we have decided, are determined by the end lines of "the location."

This was upon a claim under the act of 1866, located and patented. Our comments on this language are as follows:

Counsel on both sides in that case, each from his own standpoint, having "conceded" in argument that as to locations and patents under the act of 1866 the end lines of the surface locations need not be parallel, the court, by the foregoing language conceding argumentatively that such *might* be the case, proceeds to call attention to the fact that by means of such locations title to only a single vein could be obtained; and that, if the rule of non-parallelism should be invoked as to such single vein, it must be borne in mind that the act of 1872 confers title to all other veins whose apices are within such locations; so that, as all the lodes within a location must be bounded by the same end lines, the rule of non-parallelism would have to be applied, with the result shown by the illustration (see page 72, brief of plaintiff in error) to a set of lodes the title to which was conferred by a statute the cardinal principle of which is parallelism.

The language of the court implies that no such extraordinary privilege can be conceded to such "other veins" within old locations; and if not, then, since all the lodes within a location must be bounded by the same end-line planes, it is clear that the orignal vein must be bounded by parallel planes, so as to be included within the same planes bounding the "other veins," which planes, for the reasons shown, must be parallel.

Now, it is simply impossible to discuss all these questions within the time permitted.

A great deal has been said here about explaining away the decisions in Lakin *v.* Dolly and Lakin *v.* Roberts. I

undertake to say that those are two cases that cannot be explained away. Those two cases were decided, as the court in each case stated, *under the statute.* I will read rapidly, with your honors' permission, from the decision of Judge Hawley in Lakin *v.* Dolly, 53 Fed., 333, as follows:

"It is claimed by plaintiff that upon the facts of this case, "and under the provision of sec. 2328, R. S. U. S., the patent "must be considered and treated as having been issued "under the act of Congress of 1866. It is immaterial, so far "as the result of this decision is concerned, whether the "patent is construed with reference to the act of 1866, or the "subsequent provisions of the Revised Statutes, under and "in pursuance of which the patent purports to have been "issued; but I am of opinion that the question as to the va-"lidity of the patent depends upon the construction to be "given to sec. 2320, R. S.

"This section reads as follows:

"'Mining claims upon veins or lodes of quartz or other "'rock in place bearing gold, silver, cinnabar, lead, tin, cop-"'per or other valuable deposits, heretofore located, shall "'be governed as to length along the vein or lode by the "'customs, regulations, and laws in force at the date of their "'location. A mining claim located after the 10th day of "'May, 1872, whether located by one or more persons, may "'equal, but shall not exceed 1,500 feet in length along the "'vein or lode; but no location of a mining claim shall be "'made until the discovery of the vein or lode within the "'limits of the claim located. No claim shall extend more "'than 300 feet on each side of the middle of the vein "'at the surface, nor shall any claim be limited by any "'mining regulations to less than 25 feet on each side of the "'middle of the vein at the surface, except where adverse "'rights, existing on the 10th day of May, 1872, render such "'limitation necessary. The end lines of each claim shall "'be parallel to each other.'"

Now, under the language of the court this entire section seems to be clear, and we would like to adopt this as our own:

"This entire section seems to be clear, definite, and cer-
"tain. It provides that all mining claims upon quartz
"lodes located prior to its passage should be governed, as
"to the length of the claim along the lode, 'by the cus-
"'toms, regulations and laws in force at the date of
"'their location;' that the claims located after May 10,
"1872, 'may equal, but shall not exceed, 1,500 feet in
"'length along the vein or lode.' So far the section re-
"lates solely to the question of the length of the lode
"that may be located. It next takes up the question as to
"how much surface ground will be allowed to the locator of
"a quartz lode, and says that 'no claim'—evidently mean-
"ing all claims, whether coming within the first clause re-
"lating to claims located prior to the passage of this section,
"or within the second clause, relating to locations made sub-
"sequent thereto—'shall extend more than 300 feet on each
"side of the middle of the vein at the surface.' Having thus
"expressed the extent of the surface ground to which the loca-
"tor may be entitled, it further provides that the amount of
"the surface ground shall not in any case be limited by
"any mining regulations to less than twenty-five feet on
"each side of the middle of the vein at the surface, except
"in certain contingencies which have no application to the
"facts of this case. After the passage of the act of which
"this section forms a part, it seems very clear to my mind
"that the Land Department had no jurisdiction, power, or
"authority to issue a patent for a quartz lode to any surface
"ground exceeding 300 feet in width on each side of the
"middle of the vein or lode, and that any patent which is
"issued for more than that amount of surface ground is ab-
"solutely null and void as to the excess over 300 feet, and
"can be collaterally attacked in a court of law."

I am entirely aware, if your honors please, that Judge Hawley undertook to explain away this decision by saying that it was an important fact in the case that the local regulation allowed only 100 feet of surface. But, if your honors please, I desire to ask, with all due respect to Judge Hawley, if the local regulation allowed only 100 feet, and if this decision was based upon that regulation, how is it that he allowed 300 feet by his decision? When this case went up to the court of appeals the decision there was rendered by his honor Mr. Justice McKenna in Lakin *v.* Roberts, 54 Fed., 461. We think that decision throws light on this subject. He says:

"Plaintiff's counsel contends that the provision for the "width of claims applies only to subsequent locations, and "that section 2328 of the Revised Statutes reserves to plain- "tiff the provisions of the act of July 26, 1866. Section "2328 of the Revised Statutes is as follows:

"'Applications for patents for mining claims under former "'laws now pending may be prosecuted to a final decision "'in the General Land Office, but in such cases, where ad- "'verse rights are not affected thereby, patents may issue in "'pursuance of the provisions of this chapter, and all pat- "'ents for mining claims upon veins or lodes heretofore "'issued, shall convey all the rights and privileges conferred "'by this chapter where no adverse rights existed on the "'10th day of May, 1872.'

"It is not contended that plaintiff's interests were so far "vested that, by that act, Congress had no power to limit or "vary them. We shall assume, therefore, that Congress had "this power, and, having it, we think it exercised it in the "provisions we have quoted. The language of the section "of the Revised Statutes must be confined to preserving the "application, and of all rights except the size of the claim, "length and width of it."

And what more important feature as to the length of the claim could there possibly be than this requirement of parallelism? Taking this language in its broadest sense, as I understand his honor meant it, that feature—that incident as to the length of the claim—is one of those which the statute meant to make universal.

Mr. Justice McKenna: I have forgotten that case in its entirety, but was not that more concerned with width than length?

Mr. Wright: It was the width.

Mr. Justice McKenna: Was the act of 1872 heard of then?

Mr. Wright: Not at all. The distinction Judge Hawley draws is between the first half and the last half of the paragraph, the *first* referring to the *old* locations, and the *latter portion* to *all* locations.

Mr. Justice McKenna: Those who claim rights under the act of 1872 may be more concerned with the width of the claim than with the length of the claim, because, under the act of 1866, the single lode was given to a length along the lode, and hence the width of the claim was not given. Until the act of 1872 the width was a matter of no importance.

Mr. Wright: That is correct.

Mr. Justice McKenna: Is not that the explanation of those cases?

Mr. Wright: That is a portion of the explanation.

Mr. Justice McKenna: In the absence of authority, is it not in this case?

Mr. Wright: In direct connection with that view is the necessity for a bounding plane to these extra veins granted

by the act of 1872, and, in our opinion, that is why the requirement of parallelism was added.

One point here is as to whether the patentee here had notice. Mr. Lindley laid stress upon that. It appears to us that the statute itself was all the notice that was necessary. A statute always gives notice, and when that statute was passed, then, if the party owning the existing equity desired to enjoy all the rights and benefits of the new statute, he should have made his claim comply, the statute itself being a sufficient notice.

I must advert for a moment to the Eureka case. Judge Lindley is mistaken when he says this case was parallel with the case at bar. If there existed up here on this map (showing) a claim with parallel end lines back of the Pioneer, the parallel would be nearer.

I think I am justified in the idea that the Champion claim parallel end lines were the controlling element, in so far as the judgment went upon the end-line question. I use the quotation used by Mr. Lindley in his brief:

"The particular mining ground in dispute is situated "within the zone of limestone which has been described and "within planes drawn vertically down through the end "lines of the Champion Company as patented"——

It appears to me that by mentioning this first the court makes it the cardinal fact——

"and within planes drawn vertically down through the ex- "treme points of the patented locations of the At Last and "Margaret claims at right angles to the course or strike of "the zone and produced so as to follow its dip."

"The top or apex of the zone is within the surface lines "of the patents to the Eureka Company, and the zone dips at

"right angles to its course and on such dip extends under the "surface of the Arctic and Utah claims. * * * The end "lines of the surveys of the At Last and Margaret (Lupita) "claims as patented are not parallel with each other.

"The finding that the ground in dispute is within the "end lines and that the apex is within the surface lines set- "tles the rights of the parties between themselves as well "under their patents as under their compromise agree- "ment."

This case was decided, as your honors are well aware, upon the compromise agreement.

Mr. LINDLEY: That is the language of the Supreme Court of the United States.

Mr. WRIGHT: Yes, as I read it.

Mr. Justice MCKENNA: What does it mean? What does that language mean—"rights of the parties between them- "selves as well under their patents as under their com- "promise agreement?"

Mr. WRIGHT: If your honor please, the two parallel end lines of the Champion were first mentioned. The court next draws attention to bounding planes drawn vertically down through the extreme points of the lodes in the other patents, and those are the two sets of end lines that seem to have been under consideration at the time.

Your honors will bear in mind that this case was decided or at least the opinion was written, by Mr. Chief Justice Waite. Five years after this case was decided the Elgin case was decided. Mr. Chief Justice Waite dissented from the decision in that case, and again advanced the doctrine that the extralateral right should be bounded by vertical planes drawn downward at right angles to the general course

of the lode from the end points of the lode within the location. It has been our understanding that that was his view when he wrote the opinion in the Eureka case—between the end-line planes drawn down at right angles—and that phrase, we think, is what was meant, the parallel end lines; that is, the surface parallel end lines of the Champion extended and the other end lines drawn as I have described and as I understand him in his dissenting opinion in the Elgin case.

Mr. Justice McKENNA: There were different patents for different locations?

Mr. WRIGHT: Separate patents.

Mr. Justice McKENNA: You confine your explanation to one location, do you not?

Mr. WRIGHT: Not at all. The language here is that the ore in dispute was this portion of the Potts chamber (showing), which was between the end lines of the Champion, extended downward and between end-line planes drawn from the end points of these other locations (showing) at right angles to the general course of the lode.

Mr. Justice McKENNA: I understand you now.

Mr. WRIGHT: Those appear to have been the end lines which he intended, and we think that all the more because of his remarks in his dissenting opinion in the Elgin case, not believing that within the short space of five years he had discarded his already well-considered opinion.

Mr. LINDLEY: The first opinion was under the act of 1866 and the last was under the act of 1872.

Mr. WRIGHT: That cuts no figure. Mr. Chief Justice Waite applied the rule to all claims, and we say the same rule applies to all claims.

I will stop, your honors, whenever my time expires.

Mr. Chief Justice FULLER: Your time is out.

Mr. WRIGHT: If your honors please, I leave the discussion of these matters the less reluctantly because we have fully expressed our views in the brief we have presented for the consideration of the court.

At the suggestion of my colleague, Mr. Garber, the argument made by myself in the trial court was printed as a part of this brief. I may say that, if I had the time and could do so, I would be glad to present the case to your honors in almost exactly the same way again, the only changes I would make being those of verbiage, and for this reason we most respectfully but urgently ask your honors to consider it in your examination of these questions.

Mr. LINDLEY: May we have ten days to print and file our oral arguments?

Mr. Chief Justice FULLER: Probably ten days is longer than necessary.

Mr. LINDLEY: What will the court allow?

Mr. Chief Justice FULLER: Five days will be allowed to print and file.

ADDENDUM.

By consent of counsel the following suggestions as to the Eureka case are added as part of the argument of Mr. Wright:

In the Eureka-Richmond case the question in the case at bar was not *decided*. The decision is correctly stated in the syllabus. The *findings* in the record were made special, so as to leave it open to argue in this court the question of lode or no lode. That question was fully argued. Mr. Wren

in his oral argument for the Richmond said that if the whole zone was not one lode the case was probably correctly decided. This court declined to decide the question of lode or no lode. This we infer from the following language of the opinion: "Whether the limestone *was or was not* within the meaning of the acts of Congress * * * a single vein, lode, * * * it was all mineralized," etc. (Italics ours.) And especially from the fact that such a question presented and argued as it was in that case would never have been decided by mere implication or without definite statement of the reasons. And it follows that it could not have been intended to decide the question of extralateral rights under patents with flaring end lines.

If there was no lode within the meaning of the statutes, there could have been no extralateral rights, whether the lines were parallel or not. It is, therefore, clear that the whole case went off, as stated in the syllabus, on the compromise agreement. There was no finding that any particular *lode* apexing in the patents could be followed into the Potts chamber. The finding was that the *whole zone* was at right angles in its course to the end lines of the Champion. This will appear from the diagram and the finding of the course of the zone. Now, if this zone was not a *lode*, a question waived, as we have endeavored to show, the question of the parallelism of the end lines, in view of the compromise agreement, ceased to be involved or necessary to be decided. And so the language of the opinion was framed to express the thought that the compromise agreement disposed of the case, and that the Richmond Company, by reason of that agreement, were *precluded* from raising the question here involved. In other words, the question here raised could not be decided

in the Eureka case. This is made still plainer by the expression that the findings gave the right to the Eureka both under the patents and the compromise agreement. Because that expression is carefully phrased and guarded to exclude any thought of deciding the question as here presented, it is said that their rights are settled *as between themselves*. The language is: "The Richmond Company is in no condition to dispute the validity of the Eureka patents for the At Last and the Margaret because the end lines of the survey are not parallel, *as it has agreed* with the Eureka for a consideration not to work in the limestone to the south and east." (Italics ours.)

That was undoubtedly so, both because of the agreement and of the warranty deeds. It was equivalent to saying that the deeds and agreement settled the questions regardless of the parallelism of the lines. Moreover, even if the whole zone was held to constitute a lode, a glance at the map will show that the Eureka had patents enough with strictly parallel end lines to take the part of the Potts chamber which was in controversy and all the ground in dispute, as covered by patents with parallel end lines, excluding such as the Margaret.

So the Eureka case could only be a precedent here in regard to the compromise, and in regard to that in our case none was allowed to be proved, and it is therefore here as if absolutely non-existent.

Murdock cases, 20 Wall., since followed—see.